

Editor's note: Appealed – aff'd, Civ.No. A80-050 (D. Alaska May 8, 1981), aff'd, No. 81-3299 (9th Cir. Sept. 21, 1982)

MARDELLE M. SMITH  
SHERMAN C. SMITH

IBLA 79-137

Decided August 16, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting application to purchase trade and manufacturing site, AA-15078.

Affirmed.

1. Alaska: Trade and Manufacturing Sites – Withdrawals and Reservations: Effect of

Where a trade and manufacturing site is located on land that is withdrawn from appropriation prior to its occupancy and use, an application to purchase is properly denied despite the fact that applicant entered the land as a special use permittee.

2. Administrative Procedure: Hearings – Rules of Practice: Appeals: Hearings

The Board of Land Appeals has the discretion to grant a request for a hearing on issues of fact but, in order to warrant such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the relief sought.

APPEARANCES: D. A. Burr, Esq., Burr, Pease & Kurtz, Inc., Anchorage, Alaska, for the appellants.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Mardelle M. Smith and Sherman C. Smith have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 29, 1978, rejecting their application to purchase trade and manufacturing site, AA-15078.

The land embraced by appellants' application is located in sections 28 and 29, T. 5 N., R. 3 W., Seward meridian, Alaska. On

February 23, 1909, such land was withdrawn by Proclamation 852, 35 Stat. 2231 (1909), for the purpose of enlarging the Chugach National Forest.

Appellants claim occupancy and use of the land from August 14, 1959, when appellant Sherman C. Smith was issued a special use permit for the purpose of engaging in a sawmill operation on the land, until July 1974. The special use permit was revoked by the Regional Forester, U.S. Forest Service, Department of Agriculture, on January 6, 1966, for failure to comply with the terms of the permit. This decision was sustained on appeal by the Board of Forest Appeals, Department of Agriculture, on May 8, 1967. On November 30, 1977, appellants submitted an application to purchase the subject land as a trade and manufacturing site (T&M) pursuant to the Trade and Manufacturing Act, as amended, 43 U.S.C. § 687a (1976). <sup>1/</sup>

BLM rejected appellants' application citing the withdrawal of the land pursuant to Proclamation 852, supra, and quoting 43 CFR 2562.3(d)(2), under which an application for a T&M site must show that no portion of the land sought to be purchased is "reserved for any purpose by the United States." BLM also noted that failure to file a notice of location of a T&M site within 90 days from initiation of a claim results in the claimant not being given credit for occupancy "prior to the filing of (1) a notice of the claim in the proper district land office, or (2) an application to purchase, whichever is earlier." 43 U.S.C. § 687a-1 (1976). BLM concluded that since appellants had never filed a notice of location they "could be given no credit for any occupancy of the land . . . prior to the filing of the application to purchase on November 30, 1977."

In their statement of reasons for appeal, appellants contend that they entered the subject land "via a special use permit . . . for the express purpose of acquiring patent to the subject lands under the Bureau of Land Management regulation pertaining to trade and manufacturing sites" and, having "fully satisfied all requirements for patent," are entitled thereto. Appellants also argue that no notice of location was required as the land was national forest land or, in the alternative, a special use permit had been "recognized" by BLM and the Forest Service as the equivalent of a notice of location. Appellants have also requested a hearing.

[1] Where a T&M site is located on land that is withdrawn from appropriation prior to its occupancy and use for the purposes of trade and manufacture, the invalid claim cannot be perfected. Sandy Fondy, 37 IBLA 48 (1978); Allen D. Hodge, 22 IBLA 150 (1975). Accordingly, BLM properly rejected appellants' application to purchase land as a T&M site which had previously been withdrawn by executive proclamation as national forest land.

---

<sup>1/</sup> Repealed effective October 21, 1986, by P.L. 94-579, Title VII, section 703(a), October 21, 1976.

We turn next to appellants' contention that they are entitled to purchase the land as a T&M site having entered the land for the "express purpose of acquiring patent" and having "fully satisfied all requirements for patent." Regardless of appellants' intention upon entering the land or the extent to which they developed the land as a T&M site, the subject land, as noted above, was simply not open to appropriation as a T&M site at any time during appellants' alleged occupancy and use.

The fact that they entered the land pursuant to a special use permit gave the appellants no greater right in the land. The permit merely allowed appellants the privilege of temporarily using the land for a special purpose. 36 CFR 251.1(a); cf. Edward L. Butterworth, 23 IBLA 136, 138 (1975). By its terms, the permit could be terminated for a breach of its conditions or "at the discretion of the regional forester or the Chief, Forest Service." It conveyed no interest in the land.

[2] Appellants have requested that a hearing "on all issues of fact" be ordered by the Board pursuant to 43 CFR 4.415. The Board has the discretion to grant a request for a hearing on issues of fact but, in order to warrant such a hearing, an appellant must allege facts which, if proved, would entitle him to the relief sought. Sun Studs, Inc., 27 IBLA 278 (1976); Rodney Rolfe, 25 IBLA 331 (1976). Appellants have offered no facts to suggest that their T&M claim is not located on withdrawn land. As a matter of law their claim cannot be perfected and their application to purchase must be rejected. Accordingly, appellants' request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss  
Administrative Judge

We concur.

Douglas E. Henriques  
Administrative Judge

Joan B. Thompson  
Administrative Judge

